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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of:

Communications Assistance for Law  
Enforcement Act

CC Docket No. 97-213

**COMMENTS REGARDING CALEA MANUFACTURER REVENUE ESTIMATES**

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## SUMMARY

The aggregated manufacturer revenue estimates set out in the Commission's Public Notice have no relevance to the Commission's task under Section 107(b) of CALEA. The revenue estimates offer no basis for comparing alternative means of correcting any of the J-Standard's deficiencies, and thus cannot assist the Commission in choosing the most "cost-effective" means of curing these deficiencies. If the Commission nevertheless intends to "consider" these data, as it has suggested, the Commission should grant interested parties a more meaningful opportunity to comment on them. As it stands, the Commission has released aggregated numbers with virtually no explanation of the information and assumptions which underlie them, leaving the government and other interested parties to guess at what they mean and what inappropriate assumptions they may incorporate. The government suggested several means of mitigating this problem in its Petition for Reconsideration of the order granting confidential status to the underlying manufacturer revenue data, and the Commission should consider adopting the government's suggestions.

Despite the fact that the government thus far has been denied the opportunity to look behind the aggregated numbers, the magnitude of the aggregated numbers and other considerations suggest that the numbers are inflated far in excess of the costs that carriers will incur in obtaining CALEA compliance solutions. First, the numbers likely represent estimates that are based on the manufacturers' "list" prices, with no reflection of the substantial discounts that are standard practice in the industry. Second, a substantial portion of the total costs involved in achieving CALEA compliance will be reimbursed by the government. Thus, only by significantly reducing the aggregated numbers can they be brought close to realistic estimates of the carriers' costs of acquiring CALEA solutions. Yet even taking these numbers at face value, they demonstrate that the carriers' cost-related assertions in prior filings are highly questionable.

## DISCUSSION

### Introduction

The Commission is currently engaged in a rulemaking proceeding under Section 107(b) of the Communications Assistance for Law Enforcement Act (CALEA) to determine whether J-STD-025 (J-Standard), the industry "safe harbor" standard, omits assistance capabilities required by Section 103, and to correct any such omissions. See Further Notice of Proposed Rulemaking, Docket No. 97-213 (released November 2, 1998) (Further Notice). In connection with this rulemaking, five manufacturers of telecommunications equipment have given the Commission estimates of the revenue they foresee collecting through the sale of CALEA solutions to telecommunications carriers, together with requests that the Commission not release these estimates to the public. The Office of Engineering and Technology (OET) recently granted the manufacturers' requests for confidential treatment, and resolved to "withhold the associated data from routine public inspection." Order, Docket No. 97-213, ¶ 1 (released Mar. 2, 1999) (Confidentiality Order). The Confidentiality Order acknowledged that the Commission "generally has not afforded confidential treatment to material submitted in rulemakings," but added that it believed the confidential treatment of these estimates would "not deprive other interested parties of a meaningful opportunity to review and comment on the material" because the Commission intended to aggregate the estimates, release the aggregated estimates for comment, and "consider only the aggregated data" in rendering its final decision. *Id.* ¶ 5.

On March 31, 1999, the Department of Justice and Federal Bureau of Investigation (the government) filed a Petition for Reconsideration of the Confidentiality Order (Petition for Reconsideration). The government asserted that the Confidentiality Order constituted an

unwarranted departure from the Commission's general policy discouraging the use of confidential information in rulemaking proceedings. The government urged the Commission to deny the confidentiality requests and return the information, or to modify the Confidentiality Order in such a way as to provide the government with a meaningful opportunity to comment.

On May 7, 1999, OET released a Public Notice setting forth the manufacturers' revenue estimates in aggregated form and requesting public comment on them. The government now submits these comments in response to the Public Notice.

**I. The Revenue Estimates In The Public Notice Cannot Assist The Commission In Fulfilling Its Statutory Mandate under Section 107(b) of CALEA.**

As the government has explained in prior filings, see, *e.g.*, Reply Comments Regarding Further Notice of Proposed Rulemaking 9-10 (filed Jan. 27, 1999) (Reply Comments), the Commission's mandate with regard to CALEA's assistance capability obligations is clearly set out in Section 107(b). The Commission must determine whether the J-Standard is "deficient" as a means of meeting the assistance capability requirements of Section 103 and, if it so determines, must adopt technical standards that meet those requirements. 47 U.S.C. § 1006(b). Section 107(b) does not empower the Commission to remove assistance capabilities from Section 103 on the ground that they would be financially burdensome for particular carriers or the industry as a whole. Rather, the Act addresses compliance burdens elsewhere, by providing that individual carriers with a demonstrated need may secure individualized exemptions under Section 109(b) of CALEA. See 47 U.S.C. § 1008(b). The costs involved in providing the required assistance capabilities are relevant to the Commission's task only with regard to choosing the *means* by which any identified deficiencies will be corrected. Section 107(b) authorizes the Commission to consider costs in choosing between

available alternatives for curing particular deficiencies, by selecting the means that will be "cost-effective" and will "minimize the cost of such compliance on residential ratepayers." 47 U.S.C. § 1006(b)(1), (3).

The aggregated revenue figures set forth in the Public Notice cannot assist the Commission in determining which means of curing particular deficiencies will be most "cost-effective" or will "minimize" the burden on ratepayers. In each instance, the numbers address only a single means of curing the deficiencies identified by the government — the means proposed in the government's "punch list." The revenue figures do not propose or address any alternative means of correcting the deficiencies in the J-Standard, much less assign revenue estimates to such alternatives. If the manufacturers were aware of more cost-effective means of curing these deficiencies, they presumably would have given the Commission revenue estimates based on such alternatives. In any event, in the absence of identified alternatives to the government's proposals for curing the deficiencies in the J-Standard, the revenue estimates associated with the punch list items cannot advance the Commission's deliberations under Section 107(b), for the relevant issue under Section 107(b) is not the *absolute* cost of any particular punch list item, but rather the *relative* cost of the punch list item in comparison with an equally effective alternative.

## **II. The Commission Should Afford Interested Parties A More Meaningful Opportunity To Comment Upon The Revenue Estimates.**

If the Commission nevertheless decides to place reliance on the manufacturer revenue estimates under Section 107(b), it should provide the interested parties with a more meaningful opportunity to comment upon the aggregated figures. Deprived of access to the information and assumptions that underlie these aggregated numbers, the government's ability to offer meaningful

comment is limited. This problem is exacerbated by the fact that the Commission has not indicated *how* it proposes to consider or use these data. The government and other commenters are thus left with the task of commenting on a set of numbers, while having little idea of what the numbers mean or what they are to be used for.

The government's Petition for Reconsideration suggested means by which the Commission could address this problem. Specifically, the Petition suggested that the Commission: (i) permit the government to examine the information underlying the aggregated figures pursuant to a protective order; (ii) condition its grant of the confidentiality requests on the manufacturers' agreement to release the government from the restraints imposed by non-disclosure agreements that prevent the government from releasing the cost-related information that it has obtained directly from the manufacturers, or (iii) disclose the assumptions that form the basis of the manufacturers' estimates together with the aggregated estimates. See Petition for Reconsideration 7-8.

The Public Notice does not acknowledge the concerns raised in the government's petition. The government hereby reiterates these concerns, and respectfully requests that the Commission adopt one or more of these suggested means, or other effective means, of affording the government a more meaningful opportunity to comment on the numbers contained in the Public Notice.

### **III. The Revenue Estimates Appear To Greatly Overstate The Cost Of Acquiring CALEA Solutions.**

In the absence of an opportunity to examine the information and assumptions underlying these aggregated revenue estimates, the government must speculate as to their nature. (The Commission, too, may be left to speculate, since it is unclear how much of the information and assumptions underlying their individual estimates the manufacturers divulged even to the

Commission, and since the Confidentiality Order states (§ 5) that the Commission "intend[s] to consider only the aggregated data and not the individual data provided by the manufacturers.") However, given the magnitude of the aggregated numbers and other considerations, it appears very likely that these numbers are inflated far in excess of any realistic projection of the costs that carriers will incur in obtaining CALEA compliance solutions.

To begin, it appears likely that the revenue estimates in the Public Notice are based on "list" prices that are more than *twice as high* as those that carriers will actually pay for CALEA solutions. As the government explained in its Reply Comments, it is the general practice in the telecommunications industry for equipment manufacturers to grant their carrier customers significant discounts from the manufacturers' "list" prices. See Reply Comments 16. In the experience of the government's telecommunications industry experts, these discounts can range *from 30 percent to 90 percent*, depending on several market factors unique to the individual carrier-manufacturer relationship. For example, many carriers and manufacturers have long-term purchase agreements whereby a carrier agrees to purchase specified hardware and software from a given manufacturer over the life of the agreement. Additionally, manufacturers commonly offer discounts based on the number of switches for which a product is being purchased. Put simply, the more a customer purchases, the lower the unit price. Another common industry practice is for manufacturers to offer carriers a discount based on "yearly dollar value purchase" commitments, whereby discounts increase depending on the total dollar value of products purchased from that manufacturer in a given year. Discounts are also likely to be affected by the presence of competing vendors, a carrier's future network plan, potential carrier revenue generation for a specific feature, and other factors.



There are two related reasons for believing that the revenue estimates underlying the aggregated numbers reflect non-discounted "list" prices. First, the Government is not aware that any carriers have paid a fully negotiated price for CALEA solutions, such that manufacturers would be in a position to disclose the prices that will in fact be paid by the carrier, rather than their virtually meaningless "list" prices. Second, even if the manufacturers were in a position to disclose negotiated prices, they likely would be very reluctant to do so, for fear of undermining their position in future negotiations (*i.e.*, if pricing information publicly released by the Commission effectively revealed the manufacturers' average sale prices, manufacturers would find it very difficult to ask their customers to accept less favorable discounts than were reflected in these prices in future negotiations). If the Commission determines that it needs an accurate forecast of the cost to carriers of achieving CALEA compliance, it should ask these manufacturers to disclose to the Commission information regarding their past practices in granting discounts from their "list" prices to their carrier customers. In the absence of an appropriate adjustment for these discounts, the revenue information received by the Commission must be presumed to be inflated far beyond the actual costs carriers could incur in procuring these solutions.

Even if these estimates are substantially reduced to take into account typical discounts, substantial further reductions appear necessary to arrive at a sound forecast of the carriers' costs. For example, the manufacturers' revenue estimates may include the revenues they will receive in enabling carriers to meet CALEA's *capacity* requirements. As provided under Section 104(e) of CALEA, eligible capacity costs incurred by the carrier are to be reimbursed by the government. See 47 U.S.C. § 1003(e); Reply Comments 17. Furthermore, the estimates appear to be based on the premise that *all* of the switches in service in the carriers' networks must be brought into compliance

at the carriers' expense. See Public Notice ¶ 4 (stating that the manufacturers' estimates were calculated by reference to the total number of switches "in service"). Estimates based on this number of switches dramatically overstate the carriers' actual compliance costs, for several reasons. First, carriers do not bear the cost of implementing CALEA solutions on equipment, facilities, or services that were "installed or deployed" prior to January 1, 1995, unless the equipment, facilities, or services have been significantly upgraded or undergone a major modification. 47 U.S.C. § 1008. Thus, the entire portion of these estimated manufacturer revenues that relate to such facilities must be excluded from any reckoning of the carriers' compliance costs. Second, for many platforms, compliance solutions need only be incorporated into the subset of "host" and "stand-alone" switches, and not into "remote" switches. See Reply Comments 17. If manufacturer revenue estimates are premised on the notion that solutions will be purchased for each and every switch in each carrier's network, these estimates are vastly inflated.

For all of these reasons, the Commission should assume that these estimates likely represent substantially more than twice the cost that carriers will incur in obtaining CALEA solutions.

#### **IV. The Manufacturers' Revenue Estimates Demonstrate The Inflated Nature Of The Carriers' Cost Assertions.**

While the manufacturers' revenue estimates appear to be inflated far above what carriers will actually pay to obtain CALEA solutions, a comparison between the manufacturers' revenue estimates and the cost assertions that have been made by the carriers shows that the carriers' assertions to the Commission are even *more* seriously inflated. For example, the Cellular Telecommunications Industry Association has suggested in filed comments that the industry-wide cost of achieving compliance with the J-Standard alone could be as high as \$5 billion. See Comments of the Cellular

Telecommunications Industry Association Regarding Further Notice of Proposed Rulemaking (filed Dec. 14, 1998) (CTIA Comments) 2. The Commission now has before it the revenue estimates of five telecommunications equipment manufacturers that collectively cover approximately 90% of the access lines in the United States. Even without the substantial downward adjustments to these numbers that appear necessary (see *supra*), the revenue estimates indicate that the total cost to their carrier customers of acquiring complete CALEA solutions (covering not only the J-Standard but the punch list capabilities as well) will be approximately \$1.3 billion. Adjusting this figure to cover the entire industry yields an estimate of \$1.4 billion<sup>1</sup> — less than 3% of the 1997 Earnings Before Interest, Taxes, Depreciation, and Amortization of the five major Regional Bell Operating Companies (RBOCs) and GTE. See Disclosure, Inc. Database.

The manufacturers' estimates also demonstrate the implausibility of the carriers' assertions regarding the share of the overall cost of CALEA compliance attributable to the punch list. For example, both SBC and CTIA claimed that adding the punch list items would double the cost of compliance. Comments of SBC Communications, Inc. (filed Dec. 14, 1998) 5; CTIA Comments 8. Yet the manufacturers' estimates indicate that the revenues associated with the punch list items represent less than a quarter of the overall cost of compliance for the wireline portion of the industry, and only 31% of the cost for the industry as a whole. It is critical to bear in mind that, for purposes

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<sup>1</sup> Although the manufacturer's estimates appear to reflect only the cost to the carriers of acquiring CALEA solutions, and not the costs involved in deploying these solutions on their networks, the government has already established that the deployment costs associated with the punch list items would not substantially increase the carriers' overall costs of compliance. See Reply Comments 14 ("The essential process of deploying a release is the same, regardless of the particular features included in it"); BellSouth Comments (filed Dec. 14, 1998) (BellSouth Comments) 6 ("the Commission's selective pruning of punch list items will not substantially reduce carriers' capital and expense costs \* \* \*").

of this rulemaking proceeding, the costs associated with the core J-Standard are entirely irrelevant; only the incremental costs associated with the punch list have any possible legal significance under Section 107(b). See Reply Comments 11.

The carriers' assertions regarding their own compliance costs are likewise undermined by the manufacturers' estimates. Consider BellSouth's assertion that it alone would spend more than \$182 million achieving compliance with the punch list items tentatively approved by the Commission in the Further Notice. BellSouth Comments 2. This number exceeds by \$35 million the manufacturers' estimate of the costs that will be incurred by all of these five manufacturers' wireline customers *combined*, in acquiring the necessary solutions to provide these items. Likewise, GTE's asserted cost of complying with the core J-Standard (over \$400 million) represents over 70% of the cost estimated for all five manufacturers' wireline customers to acquire the J-Standard solutions. See Comments of GTE (filed Dec. 14, 1998) 7.

These comparisons confirm the merit of the government's advice to the Commission to approach the carriers' cost assertions with "a healthy measure of skepticism." Reply Comments 15. As the comparisons amply illustrate, even taking the manufacturers' revenue estimates at face value, the estimates severely undermine the carriers' assertions regarding the cost of CALEA compliance — and along with them, the carriers' general theme that the Commission must rescue the industry and ratepayers from the burdens of CALEA compliance by leaving punch list capabilities out of its "safe harbor" rule.

#### **V. More Reliable Cost Information May Be Available In The Near Future.**

In the near future, it may be possible for the Commission to review an actual negotiated price for CALEA solutions, rather than meaningless and inflated "list" prices. As noted in the Public

Notice (§ 4 n.8), manufacturers have begun negotiations related to the development and sale of CALEA solutions. When even one such negotiation is consummated, the Commission will be able to consider a meaningful number with some bearing upon the actual costs of CALEA compliance in general and the costs associated with the punch list items in particular. If the Commission intends to consider the cost of CALEA compliance (and not only the relative costs of alternative methods of curing deficiencies in the J-Standard) in its rulemaking, the government strongly encourages the Commission to look to hard numbers that emerge from negotiations, and not to speculative projections or "list" prices that bear no relation to any carrier's actual compliance costs.

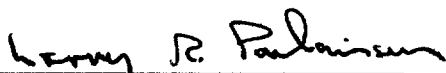
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Respectfully submitted,

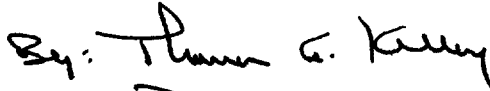
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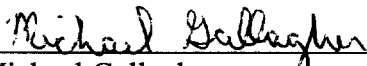
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CC Docket No. 97-213

**Certificate of Service**

I, Michael Gallagher, a Program Analyst in the office of the Federal Bureau of Investigation, Washington, D.C., hereby certify that, on May 17, 1999, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Comments Regarding CALEA Manufacturer Revenue Estimates, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 17<sup>th</sup> day of May, 1999.

  
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Michael Gallagher

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CC DOCKET 97-213  
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